

FILE COPY

**STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD**

**IN THE MATTER OF THE APPLICATION FOR
A TEMPORARY EDUCATIONAL PERMIT OF**

**FINAL DECISION
AND ORDER**

Case No. LS-9607011-MED

**VIJENDRA DAVE,
APPLICANT.**

PARTIES

The parties in this matter under § 227.44, Stats., and for purposes of review under § 227.53, Stats., are:

Vijendra Dave
1435 West 2nd Avenue
Oshkosh, Wisconsin 54901-5601

Medical Examining Board
P.O. Box 8935
Madison, WI 53708-8935

Department of Regulation & Licensing
Division of Enforcement
P.O. Box 8935
Madison, Wisconsin 53708

This matter was commenced by the filing of a Notice of Hearing on July 7, 1996. A hearing was held on July 24, 1996. Atty. Steven M. Gloe appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. Vijendra Dave appeared in person without legal counsel. Supplemental evidence relating to the hearing exhibits was filed on August 2, 1996. The hearing transcript was filed on September 3, 1996, and the Administrative Law Judge filed her Proposed Decision in the matter on December 13, 1996. Applicant filed his Objections to the Proposed Decision on December 19, 1996, and Mr. Gloe filed his response on January 3, 1997.

Based upon the entire record herein, the Medical Examining Board makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Vijendra Dave, applicant, d.o.b., 11/17/58, 1435 West 2nd Avenue, Oshkosh, WI., filed an application on or about March 18, 1996, with the Medical Examining Board for a temporary educational permit to practice medicine and surgery.
2. Dr. Dave received a M.B.B.S. Diploma in Medicine from the University of Madras, India in September 1983.
3. Dr. Dave served as a Resident in the Department of Psychiatry at Albany Medical College, Albany, New York, at least from August 1994 to October 31, 1995.
4. On April 10, 1995, the Residency Education Committee at the Medical College notified Dr. Dave that he had been placed on probation for the remainder of the academic year. The Committee's decision was based on a review of his overall performance in the program, which was judged to be marginal in a number of areas. Specific concerns that were raised include, but is not limited to: taking an inordinate amount of time to complete routine tasks (in the crisis unit rotation, on call, and in other clinical settings including Internal Medicine, and a lack of knowledge in clinical areas that by that time would be expected of a PGY-1 resident. Additional problems were identified in his professional interactions; in particular, inappropriate and unwelcome remarks or actions of a sexual nature toward female staff.
5. Dr. Dave was provided with an opportunity to appeal the Residency Education Committee's decision to an Ad Hoc Committee appointed by the Chairman of the Department, but elected not to appeal.
6. On August 29, 1995, Dr. Dave was notified that the Residency Education Committee had recommended that he be continued on probation through December 1995. The Committee's recommendation was based upon concerns that remained regarding his work, including clinical decision making, and his interactions with others, including staff and patients.
7. On October 23, 1995, the Residency Education Committee voted to recommend to the Department Chairman and the Medical Board of the Albany Medical Center that Dr. Dave be dismissed from the residency program. The Committee's recommendation was based upon a review of his overall performance, which it felt to be below minimum acceptable standards for the program. He was immediately suspended from all his resident responsibilities in the program. Dr. Dave appealed the Committee's decision to the Ad Hoc Committee appointed by the Department Chairman, which voted unanimously to uphold the Residency Education Committee's decision. On December 6, 1995, Dr. Dave appealed the Ad Hoc Committee's decision to the Medical Board of Albany Medical Center Hospital. A hearing was set for December 18, 1995. Charges to be considered included "Inappropriate and unwelcome remarks and actions of a sexual nature directed at female staff;" and "Making false allegations or, in the alternative, failure to report immediately three observed incidents allegedly involving a charge

nurse drinking alcoholic beverages and becoming intoxicated while on duty and in your presence." Dr. Dave elected not to pursue the appeal. He resigned from the residency program on December 15, 1995.

8. At least since February, 1996, Dr. Dave has been a Resident in the Department of Psychiatry at Winnebago Mental Health Institute, Winnebago, WI. In March, 1996, he made application to participate in a post-graduate training program at the Institute.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this matter pursuant to s. 448.04 (1) (c) and 448.06 (2), Wis. Stats.

2. The Findings of Fact set forth herein do not establish that applicant engaged in unprofessional conduct under s. Med 10.02 (2) (h), Wis. Adm. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that the application of Vijendra Dave, M.D., for a temporary educational permit be, and hereby is granted.

EXPLANATION OF VARIANCE

The Administrative Law Judge recommended two Findings of Fact which have been omitted from this Final Decision and Order. Those findings, set forth at paragraphs 8 and 9, were as follows:

8. During his residency at Albany Medical College, Dr. Dave made inappropriate and unwelcome remarks and actions of a sexual nature directed at a female staff member.

9. During his residency at Albany Medical College, Dr. Dave failed to report immediately three observed incidents allegedly involving a charge nurse drinking alcoholic beverages and becoming intoxicated while on duty and in his presence.

The ALJ found the evidence supporting these allegations more persuasive than Dr. Dave's explanation of the incidents in question. The board is unconvinced in that regard, however, and has instead treated the allegations as mere charges brought by the hospital which were to have been addressed at the abortive December 18, 1995, hearing, but which were ultimately unresolved. Finding of Fact 8 has been modified to reflect that approach.

Because the board considers the issues relating to applicant's actions involving the female staff member and the incident involving the nurse alleged to have been drinking while on duty to be unresolved, the board is unable to conclude that applicant engaged in unprofessional conduct at

Albany Medical Center. Accordingly, Conclusion of Law 2 has been modified consistent with that conclusion, and the Order has been modified to grant the temporary educational permit.

Dated at Madison, Wisconsin this 12th day of March, 1997.

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

by Glenn Hoberg M.D.
Glenn Hoberg, D.O.
Secretary

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
BEFORE THE MEDICAL EXAMINING BOARD

In the Matter of the Application for a Temporary Educational Permit of

Vijendra Dave,

AFFIDAVIT OF MAILING

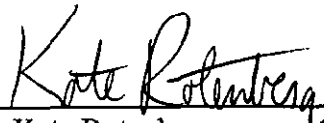
Applicant.

STATE OF WISCONSIN)
)
COUNTY OF DANE)

I, Kate Rotenberg, having been duly sworn on oath, state the following to be true and correct based on my personal knowledge:

1. I am employed by the Wisconsin Department of Regulation and Licensing.
2. On March 13, 1997, I served the Final Decision and Order dated March 12, 1997, LS9607011MED, upon the Applicant Vijendra Dave by enclosing a true and accurate copy of the above-described document in an envelope properly stamped and addressed to the above-named Applicant and placing the envelope in the State of Wisconsin mail system to be mailed by the United States Post Office by certified mail. The certified mail receipt number on the envelope is P 201 373 760.
3. The address used for mailing the Decision is the address that appears in the records of the Department as the Applicant's last-known address and is:

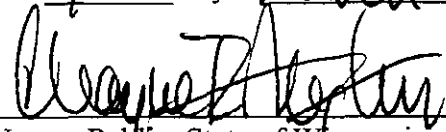
Vijendra Dave
1435 West 2nd Avenue
Oshkosh WI 54901-5601



Kate Rotenberg
Department of Regulation and Licensing
Office of Legal Counsel

Subscribed and sworn to before me

this 13th day of March, 1997.



Notary Public, State of Wisconsin
My commission is permanent.

NOTICE OF APPEAL INFORMATION

Notice Of Rights For Rehearing Or Judicial Review. The Times Allowed For Each. And The Identification Of The Party To Be Named As Respondent.

Serve Petition for Rehearing or Judicial Review on:
STATE OF WISCONSIN MEDICAL EXAMINING BOARD

1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708.

The Date of Mailing this Decision is:

March 13, 1997

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE
APPLICATION FOR A TEMPORARY
EDUCATIONAL PERMIT OF

VIJENDRA DAVE,
APPLICANT.

NOTICE OF FILING
PROPOSED DECISION
LS9607011MED

TO: Vijendra Dave
1435 West 2nd Avenue
Oshkosh, WI 54901-5601
Certified P 213 340 391

Steven M. Gloe, Attorney
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

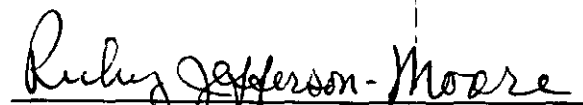
PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Medical Examining Board by the Administrative Law Judge, Ruby Jefferson-Moore. A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. If your objections or argument relate to evidence in the record, please cite the specific exhibit and page number in the record. Your objections and argument must be received at the office of the Medical Examining Board, Room 178, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before December 23, 1996. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Medical Examining Board no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision, together with any objections and arguments filed, the Medical Examining Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 13th day of December, 1996.


Ruby Jefferson-Moore
Administrative Law Judge

**STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD**

**IN THE MATTER OF THE APPLICATION FOR
A TEMPORARY EDUCATIONAL PERMIT**

PROPOSED DECISION
Case No. LS-9607011-MED

**VIJENDRA DAVE,
APPLICANT.**

PARTIES

The parties in this matter under § 227.44, Stats., and for purposes of review under § 227.53, Stats., are:

Vijendra Dave
1435 West 2nd Avenue
Oshkosh, Wisconsin 54901-5601

Medical Examining Board
P.O. Box 8935
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Department of Regulation & Licensing
Division of Enforcement
P.O. Box 8935
Madison, Wisconsin 53708

This matter was commenced by the filing of a Notice of Hearing on July 7, 1996. A hearing was held on July 24, 1996. Atty. Steven M. Gloe appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. Vijendra Dave appeared in person without legal counsel. Supplemental evidence relating to the hearing exhibits was filed on August 2, 1996. The hearing transcript was filed on September 3, 1996. The hearing was closed on September 3, 1996.

Based upon the record herein, the Administrative Law Judge recommends that the Medical Examining Board adopt as its final decision in this matter, the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Vijendra Dave, applicant, d.o.b., 11/17/58, 1435 West 2nd Avenue, Oshkosh, WI., filed an application on or about March 18, 1996, with the Medical Examining Board for a temporary educational permit to practice medicine and surgery.

2. Dr. Dave received a M.B.B.S. Diploma in Medicine from the University of Madras, India in September 1983.
3. Dr. Dave served as a Resident in the Department of Psychiatry at Albany Medical College, Albany, New York, at least from August 1994 to October 31, 1995.
4. On April 10, 1995, the Residency Education Committee at the Medical College notified Dr. Dave that he had been placed on probation for the remainder of the academic year. The Committee's decision was based on a review of his overall performance in the program, which was judged to be marginal in a number of areas. Specific concerns that were raised include, but is not limited to: taking an inordinate amount of time to complete routine tasks (in the crisis unit rotation, on call, and in other clinical settings including Internal Medicine, and a lack of knowledge in clinical areas that by that time would be expected of a PGY-1 resident. Additional problems were identified in his professional interactions; in particular, inappropriate and unwelcome remarks or actions of a sexual nature toward female staff.
5. Dr. Dave was provided with an opportunity to appeal the Residency Education Committee's decision to an Ad Hoc Committee appointed by the Chairman of the Department, but elected not to appeal.
6. On August 29, 1995, Dr. Dave was notified that the Residency Education Committee had recommended that he be continued on probation through December 1995. The Committee's recommendation was based upon concerns that remained regarding his work, including clinical decision making, and his interactions with others, including staff and patients.
7. On October 23, 1995, the Residency Education Committee voted to recommend to the Department Chairman and the Medical Board of the Albany Medical Center that Dr. Dave be dismissed from the residency program. The Committee's recommendation was based upon a thorough review of his overall performance, which it felt to be below minimum acceptable standards for the program. He was immediately suspended from all his resident responsibilities in the program. Dr. Dave appealed the Committee's decision to the Ad Hoc Committee appointed by the Department Chairman, which voted unanimously to uphold the Residency Education Committee's decision. On December 6, 1995, Dr. Dave appealed the Ad Hoc Committee's decision to the Medical Board of Albany Medical Center Hospital. A hearing was set for December 18, 1995. Dr. Dave elected not to pursue the appeal. He resigned from the residency program on December 15, 1995.
8. During his residency at Albany Medical College, Dr. Dave made inappropriate and unwelcome remarks and actions of a sexual nature directed at a female staff member.
9. During his residency at Albany Medical College, Dr. Dave failed to report immediately three observed incidents allegedly involving a charge nurse drinking alcoholic beverages and becoming intoxicated while on duty and in his presence.
10. At least since February 1996, Dr. Dave has been a Resident in the Department of Psychiatry at Winnebago Mental Health Institute, Winnebago, WI. In March 1996, he made application to participate in a post-graduate training program at the Institute.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this matter pursuant to s. 448.04 (1) (c) and 448.06 (2), Wis. Stats.
2. Applicant's conduct as described in Findings of Fact 7-9 herein constitutes unprofessional conduct under s. Med 10.02 (2) (h), Wis. Adm. Code.

ORDER

NOW THEREFORE, IT IS ORDERED, that the decision of the Medical Examining Board to deny the application of Vijendra Dave for a temporary educational permit to practice medicine and surgery be, and hereby is, affirmed.

OPINION

This matter was commenced by the filing of a Notice of Hearing on July 7, 1996. A hearing was held on July 24, 1996. Atty. Steven M. Gloe appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. Vijendra Dave appeared in person without legal counsel.

On March 18, 1996, Dr. Dave filed an application with the Medical Examining Board for a temporary educational permit to practice medicine and surgery in Wisconsin. The Board denied Dr. Dave's application on May 8, 1996, on the basis of a finding of unprofessional conduct. s. 448.06 (2), Stats; s. Med 10.02 (2) (h), Wis Adm. Code. ¹

Based upon the record herein, the decision of the Board denying Dr. Dave's application is affirmed.

Dr. Dave served as a Resident from August 1994 to at least October 31, 1995, in the Department of Psychiatry at Albany Medical College, Albany, New York.

On April 10, 1995, the Residency Education Committee at the College notified Dr. Dave that he had been placed on probation for the remainder of the academic year. The Committee's decision was based on a review of his overall performance in the program, which was judged to be marginal in a number of areas. Specific concerns that were raised include, but is not limited to: taking an inordinate amount of time to complete routine tasks (in the crisis unit rotation, on call, and in other clinical settings including Internal Medicine, and a lack of knowledge in clinical areas that by that time would be expected of a PGY-1 resident. Additional problems were identified in his professional interactions; in particular, inappropriate and unwelcome remarks or actions of a sexual nature toward a female staff member. Dr. Dave did not appeal the Committee's decision.

1. Section 448.06 (2), Stats., states, in part, that the Board may deny an application for any class of license or certificate and refuse to grant such license or certificate on the basis of unprofessional conduct on the part of the applicant. Section Med 10.02 (2) (h), Code states that unprofessional conduct includes but is not limited to any practice or conduct which tends to constitute a danger to the health, welfare, or safety of patient or public.

On August 29, 1995, Dr. Dave was notified that the Residency Education Committee had recommend that he be continued on probation through December 1995. Dr. Dave did not appeal the Committee's decision. In October, 1995, the Residency Education Committee recommended to the Chairman of the Department of Psychiatry that Dr. Dave be dismissed from the residency program. He appealed the Committee's decision to the Ad Hoc Committee appointed by the Department Chairman, which upheld the dismissal.

On December 6, 1995, Dr. Dave appealed the Ad Hoc Committee's decision to the Medical Board of Albany Medical Center Hospital. A hearing was set for December 18, 1995, but Dr. Dave elected not to pursue the appeal. He resigned from the residence program on December 15, 1995.

The December 18, 1995, hearing schedule issued by the Medical Board at the Albany Medical College stated the charges against Dr. Dave as follows (*Exhibit # 2, p. 16-17*):

- (1) Failure to demonstrate understanding of treatment principles and proficiency in clinical practice sufficient to justify continuation as a second year psychiatry resident;
- (2) Failure to progress sufficiently in the acquisition of skills and attitudes to justify continuation as a second year resident;
- (3) Failure to accept or adequately respond to supervision and direction from Departmental and other personnel in positions of responsibility and authority,
- (4) Failure to recognize and respect appropriate patient-therapist boundaries applicable to the psychiatric setting;
- (5) Unprofessional behavior and appearance exhibited during the course of House Staff duties;
- (6) Inappropriate and unwelcome remarks and actions of a sexual nature directed at female staff;
- (7) Making false allegations or, in the alternative, failure to report immediately three observed incidents allegedly involving a charge nurse drinking alcoholic beverages and becoming intoxicated while on duty and in your presence, and
- (8) Attempting by means of threats and unfounded conter-allegations to compel withdrawal of pending written charges against yourself.

At least two of the eight charges contained in the hearing schedule issued by the Medical Board of the Albany Medical College constitute unprofessional conduct in violation of s. MED 10.02 (2) (h), Code. These include inappropriate and unwelcome remarks and actions of a sexual nature directed at a female staff member and failure to report immediately three observed incidents allegedly involving a charge nurse drinking alcoholic beverages and becoming intoxicated while on duty and in his presence. *Exhibit #2, p. 16-17.*

I. Conduct Of A Sexual Nature

In reference to the allegation of misconduct of a sexual nature made by the Medical College, Dr. Dave stated that the allegation was made by the Chief Resident of the Department of Psychiatry. He said that he learned on April 11, 1995 for the first time that the Chief Resident had felt that he had come uncomfortably close to her and had prevented her from entering her car. Dr. Dave further stated that one evening after finishing dinner with his fellow first year residents and the Training Director sometime in January 1995, he escorted the Chief Resident out of the restaurant to her car. He said that he leaned within 5-6 inches of the Chief Resident, which he considered a totally innocent gesture at the time but now realizes it could have been interpreted by her as inappropriate behavior. According to Dr. Dave, the Chief Resident was already standing next to the door of her car when he leaned towards her and probably came within 5-6 inches of her face. He said that no physical contact or lewd behavior at that time was alleged by the Chief Resident; that it was a totally innocent gesture and that it was his way of saying good-bye. He said that he could not recall if he made the statement, "Don't worry, I am not going to kiss you", to the Chief Resident but that if he had, it was certainly a statement that could be misconstrued by her. *Exhibit #2, p.20, par. #13; Exhibit #3, p. 5; Exhibit #4, p. 20, par. #5; p. 87-88.*

Dr. Dave further stated that he did not consider his behavior towards the Chief Resident to be sexual harassment for various reasons, including the fact that the conduct was directed at a more senior colleague rather than a subordinate or employee. He said that the EEOC definition of sexual harassment found in the Code of Federal Regulations did not apply as submission to sexually inappropriate conduct was not explicitly or implicitly a term or condition of the harassed individual's employment or of employment decision affect the individual or of unreasonably interfering with an individual's work performance or in creating an intimidating, hostile or offensive working environment. *Exhibit #3, p. 5.*

Finally, Dr. Dave said that he suspects that Dr. Balkoski, the Director of Residency Training, was searching for damaging information or complaints against him during March 1995 as she disliked him and was looking for ways to place him on probation and eventually get him out of the program. He said that since the Chief Resident was going to finish her residency in June 1995 she probably felt that she could make this allegation against him as a favor to Dr. Balkoski. *Exhibit #3, p. 5; 10, par. 13.*

II. Failure to Report Alleged Staff Misconduct

As charged by the Medical College, Dr. Dave either made false allegations or failed to report immediately three observed incidents allegedly involving a charge nurse drinking alcoholic beverages and becoming intoxicated while on duty and in his presence. *Exhibit #2, p. 15, par. #7; Exhibit #4, p. 4-9.*

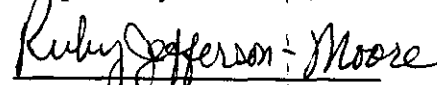
In September, 1995, Dr. Dave was interviewed by Dr. Balkoski and Dr. Klinger regarding allegations which he made against a charge nurse in the Crisis Unit at the Hospital. The allegations included: 1) that the charge nurse had been intoxicated and/or drinking alcohol at work, and 2) that the charge nurse was behaving in an unusual, changed or less than optimal manner, especially in regard to care of patients or management of the crisis unit. The allegations against the charge nurse were reported by Dr. Dave after he was notified by Dr. Balkoski of his obligations to report the allegations.

Dr. Balkoski spoke with all of the psychiatry residents regarding the allegations made by Dr. Dave against the charge nurse. She employed a standard set of questions attempting to use the language of the allegations where possible and also allowed further comments. In addition, residents were specifically asked if they had ever had any question about the charge nurse's competence, care of patients, judgment, ability to remember patients present in the CIU; or any suspicions or observations of unusual or changed behavior on her part. All of the residents answered negative. Dr. Balkoski did not find confirm any of the allegations made by Dr. Dave against the charge nurse. *Exhibit # 2, p. 7-9, 32.*

Dr. Dave has shown by his conduct that he is incapable of practicing in a manner which safeguards the interest of the public. Based upon the record herein, the Administrative Law Judge recommends that the Medical Examining Board adopt as its final decision in this matter, the proposed Findings of Fact, Conclusions of Law and Order as set forth herein.

Dated at Madison, Wisconsin this 13th day of December 1996.

Respectfully submitted,



Ruby Jefferson-Moore
Administrative Law Judge